Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	CC Docket No. 96-115
Telecommunications Act of 1996:	)	
	)	
Telecommunications Carriers' Use of	)	
Customer Proprietary Network Information	)	
and Other Customer Information	)	

REPLY COMMENTS OF THE INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA

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SUMMARY OF POSITION

In its initial comments, the Information Technology Association of America ("ITAA") urged the Commission to adopt a minimum number of straightforward, enforceable rules to govern the handling of customer proprietary network information ("CPNI") so that the pro-competitive goals of Section 222 of the Communications Act could be successfully achieved. In their comments, other parties confirm the competitive threat which the carriers' unrestricted access to CPNI poses to the health of the telecommunications and enhanced services markets. The comments demonstrate that the only way to ensure that the intent of Section 222 is fulfilled is to require carriers to provide customers with written notification of their CPNI rights and to require the carriers to obtain written authorization before using CPNI to market goods and services other than those from which the CPNI is derived.

A handful of carriers would have the Commission undo the consumer and marketplace protections which Section 222 creates. These carriers variously argue: that carriers should have unrestricted access to CPNI to market enhanced services, customer-premises equipment and other non-telecommunications services; that the Commission's rules should only establish a "safe harbor" beyond which carriers could venture at their own risk; that carriers should be free to infer customer authorization to use CPNI; and that carriers should be able to craft customer notification and authorization procedures as they see fit. Each of these proposals should be rejected. Section 222 was carefully crafted by Congress to prevent the anticompetitive use of CPNI. The carriers' proposals would allow them to circumvent the statutory language and congressional intent. Moreover, Congress has made it

clear that, with certain limited exceptions, customers are to control the dissemination and use of their CPNI. The carriers' proposals would subvert customer control.

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The Information Technology Association of America ("ITAA"), by its attorneys, hereby replies to the comments that were filed in response to the Commission's Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding on June 11, 1996.[1] As set forth more fully below, the Commission should reject the suggestions advanced by a handful of carriers that, if accepted, would upset the balance between "competitive and consumer privacy interests" established by Congress with respect to customer proprietary network information ("CPNI").[2] The Commission should follow the

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[1] See Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Notice of Proposed Rulemaking, CC Docket No. 96-115, FCC 96-221 (released May 17, 1996) [hereinafter "Notice"]. Unless indicated otherwise, all references to comments are to those filed in this proceeding on June 11, 1996.

[2] S. Rep. No. 458, 104th Cong., 2d Sess., 205 (1996); see also Pub. L. No. 104-104, § 702, 110 Stat. 56, 148-49 (1996) [hereinafter the "1996 Act"].

clear intent of Congress and adopt simple, enforceable CPNI rules that will achieve the pro-consumer, pro-competitive goals of Section 222.

I. THE COMMENTS CONFIRM THE NEED FOR EFFECTIVE CPNI RULES

In adopting Section 222, Congress recognized that the unrestricted use of CPNI by regulated carriers would adversely affect competition in telecommunications and telecommunications-dependent markets.[3] The comments confirm the legitimacy of these concerns. In its initial comments, ITAA identified some of the anticompetitive conduct that its member companies encountered with respect to the misuse of CPNI under the Commission's Computer III requirements. Likewise, other non-carriers -- and even many carriers -- noted the competitive dangers presented by the carriers' unique access to CPNI.

The Alarm Industry Communications Committee, for example, described the harm that could be wrought in the alarm monitoring industry in the absence of adequate restrictions on the use of CPNI by local exchange carriers ("LECs"), the carriers upon which alarm monitoring companies principally depend.[4] The Telecommunications Resellers Association expressed similar concerns with regard to the conduct of the facilities-based carriers upon which its member companies rely.[5] Although the nation's largest interexchange carriers ("IXCs") suggested they would handle CPNI with due regard to the

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[3] The Commission itself has long recognized that CPNI safeguards are necessary to prevent anticompetitive conduct and to protect the legitimate privacy expectations of consumers. See Notice at ¶ 4.

[4] See Comments of Alarm Industry Communications Committee at 2-4 [hereinafter "AICC Comments"].

[5] See Comments of Telecommunications Resellers Association at 3-6 [hereinafter "TRA Comments"].

legitimate interests of their customers and competitors, they argued that strict CPNI rules are necessary for their most formidable, future competitors, the Bell Operating Companies ("BOCs") and GTE.[6]

Airtouch's comments provide the most graphic illustration of the abusive conduct in which carriers can engage in the absence of effective CPNI rules. Specifically, Airtouch highlights a CPNI authorization form used by Pacific Bell, which was apparently designed not to apprise customers of their CPNI rights, but rather to induce them to surrender those rights. In a flier which Pacific Bell apparently mailed to all of its customers, Pacific Bell announced its "frequent caller" awards program. As explained by Pacific Bell's flier, "It Doesn't Take Magic to Turn Your Phone Bill into Awards," then in large bold print, "Just Your Signature." Almost the entirety of the flier promotes Pacific Bell's frequent caller program, and the prizes and discounts it makes available. At the very end of the promotional material, below the signature line for enrolling in the program, and in virtually unreadable print less than one millimeter in size, the flier authorizes Pacific Bell and all of its related companies to share the enrollee's CPNI.[7]

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[6] See, e.g., Comments of Sprint Corporation at 7 [hereinafter "Sprint Comments"]; Comments of MCI Telecommunications Corporation at 19-20 [hereinafter "MCI Comments"]; Comments of LDDS WorldCom at 11 [hereinafter "LDDS WorldCom Comments"].

[7] See Comments of Airtouch Communications, Inc., Attachment A [hereinafter "Airtouch Comments"]. Pacific Bell's customers can apparently enroll in the awards program by telephone but -- in print about twice the size of the CPNI authorization -- are advised that Pacific Bell "will still require your signature before you can redeem Awards." Id.

This is precisely the type of conduct which Section 222 is intended to prevent. The Commission should therefore ensure that its CPNI rules are consistent not only with the letter of Section 222 but also, unlike several of the carriers' proposals, with its underlying pro-competitive intent.

II. CONTRARY TO THE CLAIMS OF THE CARRIERS, SECTION 222 DOES NOT PERMIT THE UNAUTHORIZED USE OF CPNI TO MARKET ENHANCED SERVICES

In discussing the scope of Section 222, the Commission's Notice correctly recognizes that "CPNI obtained from the provision of any telecommunications service may not be used to market information services."[8] Notwithstanding the plain language of the statute, several of the carriers have advanced the incredible argument that Section 222 supports the opposite conclusion -- namely, that carriers can use CPNI without customer approval to market information (or enhanced) services. There simply is no basis for their position.[9]

GTE's comments are not atypical. Like a number of other carriers, GTE asserts that the statute supports "integrated treatment" of enhanced services and their

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[8] See Notice at ¶ 26. Accord Comments of Information Technology Association of America at 3; Comments of CompuServe Incorporated at 4-5 [hereinafter "CompuServe Comments"].

[9] Indeed, these arguments are so baseless, and so violative of congressional intent, that they warrant no further consideration by the Commission. Instead, these claims should be stricken from the record. See "Commission Taking Tough Measures Against Frivolous Pleadings," FCC Public Notice, FCC 96-42 (Feb. 9, 1996) (warning that pleadings without grounds to support them would be stricken).

underlying basic services.[10] In doing so, GTE alludes to Section 222(c)(1)(B), which states that a carrier may use individually identifiable CPNI, derived from a particular telecommunications service, "in its provision of . . . services necessary to, or used in, the provision of such telecommunications services, including the publishing of directories."[11] GTE and the other carriers advancing this position have essentially asked the Commission to read this portion of the statute out of existence.

Enhanced services, by definition, are not necessary to a carrier's provision of telecommunications services. Telecommunications services involve the establishment of a transparent communications path and the transmission of information over that path. Enhanced services, by contrast, involve the use of computer processing to (among other things) generate, acquire, transform, store and process information.[12] Thus, as the Commission has traditionally recognized, while telecommunications services are necessary to the provision of enhanced services, the converse is not true.[13]

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[10] Comments of GTE Service Corporation at 12 n.25 [hereinafter "GTE Comments"]; see also Comments of U S West, Inc. at 14-15 [hereinafter "U S West Comments"]; Comments of NYNEX at 11-13 [hereinafter "NYNEX Comments"]; Comments of Cincinnati Bell Telephone at 6 [hereinafter "Cincinnati Bell Comments"].

[11] 1996 Act, 110 Stat. at 148.

[12] See id., 110 Stat. at 59-60 (adding definitions of "telecommunications" and "information services" to the Communications Act). As ITAA has indicated, for purposes of this proceeding, "enhanced" and "information" services should be considered one and the same.

[13] See 47 C.F.R. § 64.702 (defining enhanced services as non-common carrier services).

Nor can it be fairly said that enhanced services are "used[] in the provision" of telecommunications services.[14] Rather, enhanced services are independently provided to consumers. By including the phrase "used in" in Section 222, Congress has recognized that, within the realm of telecommunications, there may be some common carrier activities that are not, as a technical matter, "necessary" to the provision of a particular telecommunications service, but which nonetheless can be considered a component part of that service. In this regard, the Commission has found that speed dialing -- which involves subscriber interaction with stored information and would otherwise be classified as an enhanced service -- can be offered as a regulated Centrex service because it serves but one purpose: "facilitating establishment of a transmission path over which a telephone call may be completed."[15] Congress made a similar determination with respect to the publishing of directories.[16] Enhanced services are distinguishable from these examples, because enhanced services are not the building blocks of telecommunications services. Just the opposite, telecommunications services are the building blocks of enhanced services.

Notwithstanding the statute's plain meaning, NYNEX contends that Section 222(c)(1)(B) should be read "flexibly" so as to allow the unauthorized use of CPNI to market "at least many information services."[17] Bell Atlantic advocates a broad reading of Section 222 to facilitate joint marketing of transmission services, enhanced services, inside wiring

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[14] 1996 Act, 110 Stat. at 148.

[15] North American Telecommunications Ass'n, 101 F.C.C.2d 349, 360 (1985), aff'd, 3 FCC Rcd 4385 (1988).

[16] See 1996 Act, 110 Stat. at 97.

[17] NYNEX Comments at 13.

and customer-premises equipment.[18] These arguments contradict both the language and overriding purpose of Section 222. To read Section 222 so as to allow the broad, unauthorized use of CPNI would undo the statute altogether.[19]

BellSouth proposes yet another approach. It suggests that the Commission consider its CPNI rules as creating a "safe harbor," beyond which carriers might venture at their own risk.[20] In other words, BellSouth would have the Commission entrust the carriers to determine on a day-to-day basis what the appropriate balance of consumer and competitive interests should be. In enacting Section 222, however, Congress has made clear that carriers are not disinterested parties capable of making this determination. The carriers, therefore, should not be allowed to interpret Section 222 as they see fit.[21]

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[18] Comments of Bell Atlantic at 6-7. Bell Atlantic addresses, at length, the benefits of one-stop shopping and how Section 222 should be read so as to preserve these benefits. The two issues, however, are not interdependent. As their competitors have proven, carriers do not require CPNI to offer multiple products successfully. To the extent that CPNI is helpful in preparing service packages, the carriers -- like their competitors -- can obtain the customer's authorization to review his or her CPNI.

[19] U S West is, perhaps, the boldest in its efforts to eviscerate the statute. At one point in its comments, U S West recommends that carriers be permitted to treat all of a customer's telecommunications services as a single package, enabling the carrier to make unauthorized use of all the customer's CPNI for marketing telecommunications services. Later in its comments, U S West advocates adding enhanced services and CPE to the package, essentially eliminating any restrictions on the unauthorized use of CPNI for communications-related marketing. See U S West Comments at 5 & 14-15.

[20] Comments of BellSouth Corporation at 5-6 [hereinafter "BellSouth Comments"].

[21] GTE suggests that Fifth Amendment taking and First Amendment commercial speech issues will arise if the Commission takes too narrow a view of Section 222 and prevents carriers from using CPNI to market additional telecommunications products. See GTE Comments at 13-16. ITAA understands this argument not to apply to Section 222's prohibition on the use of telecommunications CPNI to market enhanced services. To the extent that GTE's argument does apply to enhanced services, ITAA (continued...)

The Commission should also reject suggestions that it forbear from applying Section 222 to particular classes of carriers at this time. Various parties argue that forbearance is appropriate where a carrier has a small market share, limited revenues or is in competition with a dominant LEC.[22] Forbearance, however, would completely ignore the customer privacy interests which Section 222 is also intended to protect. Moreover, although small carriers may be at a competitive disadvantage vis-a-vis large carriers, this does not justify conferring a competitive advantage on small carriers vis-a-vis non-carrier enhanced service providers.

III. THE COMMENTS DEMONSTRATE THAT ONLY WRITTEN AUTHORIZATIONS WILL ENSURE THAT THE CPNI GOALS OF SECTION 222 ARE ACHIEVED

In its initial comments, ITAA urged the Commission to adopt two limited, but clear principles with respect to individual enforcement of CPNI rights:

- Carriers should provide their customers with annual written notification of their CPNI rights and should obtain written authorization to use such information for purposes unrelated to the services from which the information is derived; and

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[21](...continued)
notes that GTE has not made its case. In Section 222, Congress has done no more than confirm that both carriers and consumers have a proprietary interest in CPNI, and that carriers may use that information broadly only with the consent of the consumer.

[22] See Comments of MFS Communications Company, Inc. at 10; Comments of Small Business in Telecommunications, Inc. at 7; Comments of Intelcom Group (U.S.A.), Inc. at 5 [hereinafter "Intelcom Comments"].

- The Commission should oversee the carriers' written notification and authorization forms, and require such forms to advise customers that they may deny access, allow partial access or withdraw a carrier's access to CPNI.

None of the commenting parties has advanced a better approach to satisfying the intent of Section 222. Indeed, there is widespread support for the Commission's conclusion that written notification and authorization are the most straightforward and reliable methods available.[23] Even certain carriers recognize the benefits of Commission oversight of written CPNI notification forms.[24]

A number of carriers, however, would have the Commission trivialize Section 222. BellSouth, for example, argues that subscribers have somehow tacitly granted carriers access to their CPNI merely by entering into a carrier-customer relationship, thereby

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[23] For comments as to the benefits of annual written notice, see Sprint Comments at 4; Comments of Consumer Federation of America at 6 [hereinafter "CFA Comments"]; Comments of Washington Utilities and Transportation Commission at 7-8 [hereinafter "WUTC Comments"]. For arguments favoring annual written notice by incumbent LECs, see Comments of Competitive Telecommunications Association at 12 [hereinafter "CompTel Comments"]; Comments of Cable & Wireless, Inc. at 7 [hereinafter "C&W Comments"]. For comments supporting written authorization, see AICC Comments at 9-10; CompuServe Comments at 3; Comments of Frontier Corporation at 7 [hereinafter "Frontier Comments"]; Comments of Excel Telecommunications, Inc. at 4-5; TRA Comments at 16; CFA Comments at 6; Comments of National Association of Regulatory Utility Commissioners at 3; Comments of Public Utility Commission of Texas at 8; WUTC Comments at 5. For arguments advocating a written authorization requirement for incumbent LECs, see CompTel Comments at 7; Airtouch Comments at 6; LDDS Worldcom Comments at 9-10.

[24] See Airtouch Comments at 13; Comments of AT&T Corp. at 15 [hereinafter "AT&T Comments"]. See also Comments of the People of the State of California and the Public Utilities Commission of California at 10.

obviating the need for any CPNI notice or authorization whatsoever.[25] Although the language of Section 222 might be argued to be ambiguous in some respects, Section 222 cannot be read to justify BellSouth's claims. The exceptions to the CPNI provisions of Section 222 allow carriers to use CPNI to perform such tasks as publish directories, render customer bills, deter customer fraud and provide customers with limited inbound telemarketing.[26] If, as BellSouth suggests, customers automatically waived their CPNI rights simply by subscribing to a carrier's services, why would Congress have enumerated these exceptions? To accept BellSouth's arguments would be to render all of Section 222 meaningless.

U S West suggests that such tacit customer approval extends to sharing CPNI among different affiliates of the same corporate family.[27] The statute, however, does not permit a carrier to share CPNI with its corporate affiliates without customer authorization. The obligations, and the exceptions to those obligations, set forth in Section 222 run to individual carriers. More specifically, the statute states that "a telecommunications carrier" must obtain customer approval to use CPNI derived from one service to market another service, and that "a" carrier must have such authorization to provide CPNI to "any person

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[25] See BellSouth Comments at 14. Similarly, BellSouth states that carriers that publish directories should be allowed to post CPNI notices in the information sections of their white pages, then infer authorization from a customer's non-response to the white pages' notice. See id. at 16 & 19-20. See also Intelcom Comments at 4.

[26] See 1996 Act, 110 Stat. at 149 (new Section 222(d)).

[27] See U S West Comments at 5-6.

designated by the customer."[28] The exceptions set forth in Section 222(d) also apply to individual carriers, i.e., not to affiliates. Again, any other reading would nullify Section 222, particularly given the statute's clear requirement that the BOCs provide interexchange services and conduct their manufacturing activities through fully separate, arm's-length affiliates.[29] If the BOCS could share CPNI among their corporate affiliates, they could undermine the effectiveness of these important structural safeguards.

Although not trivializing Section 222 as BellSouth and U S West do, other carriers advocate interpretations of the statute that, in practice, could lead to its evisceration. These carriers, for example, argue that the Commission should require written notification, but allow carriers to infer authorization to use CPNI from a customer's failure to respond to the notice; i.e., an approach which would require customers to affirmatively "opt out" of the carrier's CPNI plans.[30] Still other carriers suggest that they should be allowed to solicit a customer's authorization to use CPNI in outbound telemarketing campaigns.[31]

ITAA opposes both of these suggestions because, if permitted, they would tilt Section 222 in favor of the unauthorized use of CPNI. As Frontier Corporation has correctly warned, carriers (and in particular large carriers) are in a position to bury negative options in

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[28] 1996 Act, 110 Stat. at 148 (new Sections 222(c)(1) & (2)). Cf. Letter of Gail L. Polivy of GTE Service Corporation to William F. Caton, CC Docket No. 96-61, at 2-3 (June 20, 1996) (different affiliates within a single holding company cannot be considered a single provider).

[29] See 1996 Act, 110 Stat. at 92-95 (new Section 272).

[30] See, e.g., AT&T Comments at 14; see also GTE Comments at 6 (offering to provide customers a prepaid postcard or an "800" number to enable them to opt out easily).

[31] See MCI Comments at 8-11; Sprint Comments at 5; Comments of Ameritech at 11.

their ongoing communications with customers, thus frustrating the intent of Section 222 that customers knowingly control the dissemination of their individual CPNI.[32] Moreover, as the Commission's experience with "slamming" demonstrates, outbound telemarketing efforts designed to elicit customer "approval" could quickly and easily become exploitative, if not entirely fraudulent. If Pacific Bell's frequent caller program (noted above) demonstrates anything, it is that even campaigns to obtain written authorization can be used to undermine the intent of Section 222 if carriers are given free reign. Opt-out programs and outbound telemarketing programs inherently pose an even greater threat to the pro-competitive and pro-privacy goals of Section 222.

Notwithstanding the above, ITAA recognizes that some flexibility might be in order where competitive telecommunications markets exists, provided that any such relief is carefully crafted to prevent anticompetitive conduct and the abuse of a consumer's privacy rights. Unfortunately, the several commenters that have suggested that nondominant carriers should be free from written notice and authorization requirements (which they insist upon for incumbent LECs), do not offer any specific proposals to prevent nondominant carriers from undermining Section 222.[33]

GTE proposes that, if an opt-out approach is permitted, carriers should be required to provide written notice and either an 800 number or a prepaid postcard to allow

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[32] See Frontier Comments at 7-8.

[33] See note 21 supra. In fact, MCI argues that nondominant carriers should be free to seek consumer authorization in any manner, at any time and as often as the carriers wish. See MCI Comments at 8-11. This is exactly the type of policy which would quickly render Section 222 meaningless.

customers to indicate their decision. A customer would be deemed to have authorized the use of its CPNI thirty days after notification is given, if no opt-out decision is received by the carrier. A customer who does not opt out during the initial period could still opt out at a later time.[34] Similarly, Cable & Wireless suggests that, while written approval "appears to be a preferable method," if the Commission allows carriers to obtain oral approval, "third party verification should be employed, and the burden should be placed on the carrier to demonstrate that approval was validly obtained."[35] Protections such as these would be appropriate components of alternate CPNI rules for nondominant carriers. Any such alternate scheme, however, must be tailored to faithfully carry out the intent of Section 222. In reviewing the initial comments, ITAA has not found such a comprehensive plan.

IV. THE COMMENTS DEMONSTRATE THAT CARRIERS SHOULD PROVIDE NOTICE OF THE AVAILABILITY OF AGGREGATE CPNI AND SHOULD NOT BE PERMITTED TO USE SUCH INFORMATION PRIOR TO GIVING THE REQUISITE NOTICE

A minority of LECs argue that they should not be required to provide notice of the availability of aggregate CPNI.[36] Others argue that, if notice is required, the LECs should be permitted to use aggregate CPNI prior to giving notice of its availability.[37] Both propositions would subvert the statute. Section 222(c)(3) clearly requires aggregate data to

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[34] See GTE Comments at 6.

[35] C&W Comments at 8.

[36] See Cincinnati Bell Comments at 11; Comments of ALLTEL Telephone Service Corporation at 6.

[37] See NYNEX Comments at 16; Comments of SBC Communications, Inc. at 14.

be provided on "reasonable and nondiscriminatory terms and conditions."[38] Failure to provide notice would be patently unreasonable because, without notice, third parties would not know what aggregate data are available. In addition, a carrier's use of aggregate CPNI before disclosing its availability would be discriminatory. Section 222(c)(3) indicates that aggregate data must be provided on equal terms as between the LECs and others. Thus, at best, a LEC should be permitted to use aggregate data simultaneously with providing notice of its availability to others.

In its initial comments, ITAA suggested that carriers file notices regarding the availability of CPNI with the Commission. Pacific Telesis has proposed that such notices be posted on the LECs' Internet home pages.[39] ITAA agrees that such notice would also be useful.

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[38] 1996 Act, 110 Stat. at 148.

[39] See Comments of Pacific Telesis Group at 13.

V. CONCLUSION

For all of the reasons set forth above and in its initial comments, ITAA urges the Commission to implement Section 222 so as to achieve the pro-competitive, pro-consumer goals of Congress with respect to the protection and use of CPNI.

Respectfully submitted,

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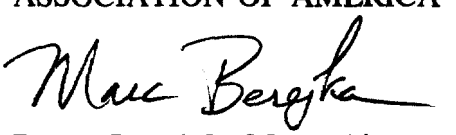

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